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3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON5 BRUCE LOWELL WILLIAMS, II,)
6 Plaintiff,)
7 v.)
8 SERGEANT R. MORGAN,)
9 Defendant.)
10)11 Before the court on Report and Recommendation is Defendant's
12 Motion for Summary Judgment (Ct. Rec. 21.) Plaintiff, a prisoner
13 currently incarcerated at the Washington State Penitentiary, is
14 proceeding *pro se* and *in forma pauperis*. (Ct. Rec. 5.) Defendant
15 is represented by Assistant Attorney General Carl P. Warring. The
16 parties have not consented to proceed before a magistrate judge.17 **PROCEDURAL HISTORY**18 On February 25, 2010, Plaintiff filed a Complaint against
19 Defendant and several other Washington State Department of
20 Corrections officials, alleging violations of his civil rights
21 pursuant to 42 U.S.C. § 1983. (Ct. Rec. 1.) On, April 9, 2010,
22 the court dismissed the Complaint in part and directed service on
23 remaining Defendant, Sergeant R. Morgan. (Ct. Rec. 7, 8.)
24 Consistent with the court's scheduling order (Ct. Rec. 18),
25 Defendant timely filed the instant Motion for Summary Judgment.
26 (Ct. Rec. 21.) The Scheduling Order, entered on July 13, 2010,
27 contained a Notice to Plaintiff, advising him of his rights and
28 obligations under court rules governing motions for summary

1 judgment. (Ct. Rec. 18 at 4.) In addition, a separate "Notice to
 2 Pro Se Litigants of the Dismissal and/or Summary Judgment Rule
 3 Requirements" was sent by the Court Clerk to Plaintiff at his
 4 address of record at the Walla Walla State Penitentiary (WWSP) on
 5 February 18, 2011. (Ct. Rec. 26.)

COMPLAINT

7 Liberally construed, Plaintiff's Complaint alleges insufficient
 8 protection and deliberate indifference to his safety in violation of
 9 his Eighth and Fourteenth Amendment rights. (Ct. Rec. 1, 6, 7.)
 10 Specifically, he claims he was seriously harmed by another inmate,
 11 after he expressed to prison officials his concerns for his well-
 12 being and living conditions to prison officials. He alleges
 13 Defendant "denied all courtesy." (Ct. Rec. 6 at 3-4.) He requests
 14 monetary damages in the amount of \$250,000. (*Id.*)

SUMMARY JUDGMENT

16 FED. RULE CIV. P. 56(c) states a party is entitled to summary
 17 judgment in its favor, "if the pleadings, depositions, answers to
 18 interrogatories, and admissions on file, together with the
 19 affidavits, if any, show that there is no genuine issue as to any
 20 material fact and that the moving party is entitled to judgment as
 21 a matter of law." See also *Celotex Corp. v. Catrett*, 477 U.S. 317
 22 (1986). Once the moving party has carried the burden under Rule 56,
 23 the party opposing the motion must present facts in evidentiary form
 24 and cannot merely rest on the pleadings. *Anderson v. Anderson v.*
 25 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Genuine issues are
 26 not raised by mere conclusory or speculative allegations. *Lujan v.*
 27 *National Wildlife Federation*, 497 U.S. 871, 888 (1990). The court
 28 will examine the direct and circumstantial proof offered by the non-

1 moving party and the permissible inferences which may be drawn from
2 such evidence. A party cannot defeat a summary judgment motion by
3 drawing strength from the weakness of the other party's argument or
4 by showing "that it will discredit the moving party's evidence at
5 trial and proceed in the hope that something can be developed at
6 trial in the way of evidence to support its claim." *T.W. Elec.*
7 *Service, Inc. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 630
8 (9th Cir. 1987); see also, *Triton Energy Corp. v. Square D Co.*, 68
9 F.3d 1216 (9th Cir. 1995).

10 Although the court holds a *pro se* prisoner complaint to "less
11 stringent standards than formal pleadings drafted by lawyers,"
12 *Haines v. Kerner*, 404 U.S. 519, 520 (1972), and will not dismiss a
13 complaint due simply to inartful pleadings, a party opposing summary
14 judgment must present "significant probative evidence tending to
15 support the complaint" to defeat summary judgment. *Anderson*, 477
16 U.S. at 248-49. Plaintiff is not entitled to rely on mere
17 allegations in his verified Complaint in opposing Defendant's Motion
18 for Summary Judgment. See, e.g., *Lew v. Kona Hosp.*, 754 F.2d 1420,
19 1423-24 (9th Cir. 1985).

20 Finally, the Supreme Court has ruled that RULE 56(c) requires
21 entry of summary judgment "against a party who fails to make a
22 showing sufficient to establish the existence of an element
23 essential to that party's case, and on which that party will bear
24 the burden of proof at trial." *Celotex*, 477 U.S. at 322. "A
25 complete failure of proof concerning an essential element of the
26 nonmoving party's case necessarily renders all other facts
27 immaterial." *Id.* at 323. The question on summary judgment, then,
28 is "whether the evidence is so one-sided that one party must prevail

1 as a matter of law." *Anderson*, 477 U. S. at 251-52. Where there is
 2 no evidence on which a jury could reasonably find for the non-moving
 3 party, summary judgment is appropriate. *Id.* at 252.

4 **42 U.S.C. § 1983**

5 To state a claim under 42 U.S.C. § 1983, Plaintiff must allege
 6 (1) the violation of a right secured by the Constitution and laws of
 7 the United States, and (2) the deprivation was committed by a person
 8 acting under color of state law. *Parratt v. Taylor*, 451 U.S. 527,
 9 535 (1981), overruled in part on other grounds, *Daniels v. Williams*,
 10 474 U.S. 327, 330-31 (1986); *Leer v. Murphy*, 844 F.2d 628, 632-33
 11 (9th Cir. 1988). A person subjects another to a deprivation of a
 12 constitutional right when committing an affirmative act,
 13 participating in another's affirmative act, or omitting to perform
 14 an act which is legally required. *Johnson v. Duffy*, 588 F.2d 740,
 15 743 (9th Cir. 1978). To hold a defendant liable for damages, the
 16 wrongdoer must personally cause the violation. *Leer*, 844 F.2d at
 17 633. If damages are sought, sweeping conclusory allegations against
 18 a prison official will not suffice; an inmate must set forth
 19 specific facts as to each individual defendant's participation.
 20 *Leer*, 844 F.2d at 634. Here, there is no issue to whether Defendant
 21 was acting under color of state law; the only question is whether
 22 Defendant's acts were unconstitutional.

23 Defendant argues there is no evidence of constitutional
 24 deprivation and all claims should be dismissed. (Ct. Rec. 23.) In
 25 support of his Motion, he filed a Statement of Facts (SOF), which is
 26 supported by a properly verified Declaration. (Ct. Rec. 24, 25.)

27 **UNCONTROVERTED FACTS**

28 Plaintiff has not objected to, or controverted by responsive

1 memorandum, the Defendant's Statement of Facts.¹ Therefore, those
2 facts are admitted to exist without controversy. LR 56.1(b) (d).

3 The uncontested material facts are summarized as follows:

4 1. Defendant is a Corrections and Custody officer at the
5 Washington State Penitentiary.

6 2. Defendant discussed Plaintiff's request for a cell
7 transfer in October 2009, informing Plaintiff that the request would
8 have to be taken to "the cell move committee."

9 3. Defendant asked Plaintiff if he was concerned for his
10 safety due to problems getting along with his cell mate.

11 4. Plaintiff indicated he was not concerned for his safety

13 ¹ Despite receiving notice pursuant to *Rand v. Rowland*, 154 F.3d
14 952 (9th Cir. 1998), cert. denied, 527 U.S. 1035 (1999), Plaintiff has
15 not responded to the Defendant's Motion for Summary Judgment. LR 7.1,
16 Local Rules for the Eastern District of Washington, states that
17 failure to respond to a motion may be considered consent by the non-
18 moving party to entry of an adverse order. LR 7.1(h)(5). However,
19 the court may consider assertions in a plaintiff's complaint as
20 evidence in opposition of a motion for summary judgment if (1) the
21 facts asserted are based on personal knowledge, (2) they are
22 admissible in evidence, and (3) the plaintiff has declared under
23 penalty of perjury that the contents of the complaint are true and
24 correct. *Schroeder v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995);
25 *McElyea v. Babbitt*, 833 F.2d 196, 197 (9th Cir. 1987). Here,
26 Plaintiff's Complaint is properly verified. (Ct. Rec. 1, 6.) In
27 addressing the Motion for Summary Judgment, the court has considered
28 Plaintiff's assertions.

1 and would request the cell move committee for a transfer.

2 5. Plaintiff could have asked for administrative segregation
3 if he believed his safety was threatened.

4 6. On October 31, 2009, Plaintiff was involved in a fight
5 with his cell mate.

6 7. Prison officials found a two-liter bottle of jailhouse
7 intoxicant ("pruno") in Plaintiff's cell following the fight.

8 8. Plaintiff was cited and plead guilty to possession of the
9 intoxicant.

10 (Ct. Rec. 24, 25.)

11 **INSUFFICIENT PROTECTION/ DELIBERATE INDIFFERENCE**

12 Insufficient protection of a prisoner resulting in harm
13 inflicted by other inmates may violate a prisoner's constitutional
14 rights. See *White v. Roper*, 901 F.2d 1501, 1503-04 (9th Cir. 1990).
15 When a prisoner is claiming he has not been afforded adequate
16 protection against violent acts by other inmates, the prisoner must
17 show the prison officials' acts were deliberately indifferent to the
18 prisoner's vulnerability. *Wilson v. Seiter*, 501 U.S. 294 (1991);
19 *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991)
20 (*en banc*), cert. denied, 502 U.S. 1074 (1992).

21 A prisoner may establish a § 1983 claim under the Eighth and
22 Fourteenth Amendments against prison officials when the officials
23 acted with deliberate indifference to the threat of serious harm or
24 injury by another prisoner. *Leer v. Murphy*, 844 F.2d 628, 633 (9th
25 Cir. 1988); *Berg v. Kincheloe*, 794 F.2d 457, 460 (9th Cir. 1986).
26 Under the deliberate indifference standard, a plaintiff must
27 demonstrate the prison officials knew he faced a substantial risk of
28 serious harm and they disregarded that risk by failing to take

1 reasonable measures to abate it. *Farmer v. Brennan*, 511 U.S. 825,
2 847 (1994).

3 Here, there are no facts in evidence that Defendant acted with
4 deliberate indifference to Plaintiff's safety. Plaintiff does not
5 dispute the fact he failed to inform Defendant he feared for his
6 safety or faced a "substantial risk of harm" from his cell mate.
7 Plaintiff offers no probative evidence to support his allegations of
8 serious injury and insufficient protection from a known threat.
9 *White*, 901 F.2d at 1503. The evidence does not support a "reliable
10 inference of wantonness" on the part of the Defendant necessary to
11 raise an issue of material fact. *Farmer*, 511 U.S. at 847. Because
12 Plaintiff has failed to establish the existence of an essential
13 element to his claim of deliberate indifference, Defendant should be
14 granted summary judgment as a matter of law. *Celotex*, 477 U.S. at
15 322.

16 CONCLUSION

17 Viewing the evidence in the light most favorable to Plaintiff,
18 Plaintiff's claim does not rise to the level of constitutional
19 deprivation. The evidence presents no issue of material fact, and
20 there is no evidence before the court on which a jury could
21 reasonably find for Plaintiff. Accordingly, **IT IS RECOMMENDED**
22 Defendant's Motion for Summary Judgment (**Ct. Rec. 21**) be **GRANTED** and
23 Plaintiff's Complaint (**Ct. Rec. 1, 6**) be **dismissed with prejudice**.

24 OBJECTIONS

25 Any party may object to a magistrate judge's proposed findings,
26 recommendations or report within **fourteen (14)** days following
27 service with a copy thereof. Such party shall file written
28 objections with the Clerk of the Court and serve objections on all

1 parties, specifically identifying the portions to which objection is
2 being made, and the basis therefor. Any response to the objection
3 shall be filed within **fourteen (14)** days after receipt of the
4 objection. Attention is directed to FED. R. CIV. P. 6(d), which adds
5 additional time after certain kinds of service.

6 A district judge will make a de novo determination of those
7 portions to which objection is made and may accept, reject, or
8 modify the magistrate judge's determination. The judge need not
9 conduct a new hearing or hear arguments and may consider the
10 magistrate judge's record and make an independent determination
11 thereon. The judge may, but is not required to, accept or consider
12 additional evidence, or may recommit the matter to the magistrate
13 judge with instructions. *United States v. Howell*, 231 F.3d 615, 621
14 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), FED. R. CIV. P.
15 72(b)(3); LMR 4, Local Rules for the Eastern District of Washington.

16 A magistrate judge's recommendation cannot be appealed to a
17 court of appeals; only the district judge's order or judgment can be
18 appealed.

19 The District Court Executive is directed to file this Report
20 and Recommendation and provide copies to Petitioner, counsel for
21 Defendant, and the referring district judge.

22 DATED March 25, 2011.

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S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE
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